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No. 89-118 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALAN R. STONEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his conviction for conspiracy to commit mail fraud because the jury instructions were erroneous under *McNally* v. *United States*, 483 U.S. 350 (1987), even though the indictment stated an offense and the evidence at trial was sufficient to support the conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-21a) is reported at 870 F.2d 102. The opinion of the district court (Pet. App. 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1989. A petition for rehearing was denied on April 13, 1989 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on July 11,

1989.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner was convicted of conspiracy to commit mail fraud (18 U.S.C. 1341) and to violate the Travel Act (18 U.S.C. 1952), in violation of 18 U.S.C. 371. He was sentenced to four months' imprisonment and fined $10,000. The court of appeals affirmed his conviction and this Court denied certiorari. *United States* v. *Smith*, 789 F.2d 196 (3d Cir.), cert. denied, 479 U.S. 1017 (1986). In 1987, after this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not apply to certain schemes involving the deprivation of intangible rights, petitioner applied for a writ of error coram nobis to vacate his conviction. The district court denied the application (Pet. App. 1a-6a). The court of appeals affirmed (Pet. App. 7a-21a).

The evidence at trial, which is summarized in the court of appeals' opinion on direct appeal, showed that petitioner participated in a scheme to bribe gov-

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[1] The petition is untimely because it was not filed within 60 days after the entry of the judgment of the court of appeals, as required by Sup. Ct. R. 20.1 in criminal cases. It is clear that this is a criminal case, rather than a civil case, because petitioner seeks a writ of error coram nobis, and the writ has been abolished in civil cases by Fed. R. Civ. P. 60(b). In *United States* v. *Morgan*, 346 U.S. 502, 505 n.4 (1954), where the Court held that the writ remains available in criminal cases, the Court noted that a motion for a writ of error coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding."

ernment officials so that they would award contracts to a company he formed, CTA, Ltd. Petitioner's company sought contracts to recover overpayments of FICA taxes on behalf of state and local governments and their employees (see 789 F.2d at 198 & n.1). It obtained a contract from Allegheny County, Pennsylvania, because petitioner provided stock worth more than $30,000 and numerous other personal benefits to Allegheny County officials. CTA also obtained a $150,000 contract from the City of Pittsburgh, although another company offered to do the job for $35,000. CTA obtained the contract because petitioner gave more than $6,000 and valuable stock options to the President of the Pittsburgh City Council. CTA performed the contract by hiring the other bidder for $35,000. Petitioner also attempted to obtain a contract from the Commonwealth of Pennsylvania. Petitioner's co-defendant, William Smith, bribed Robert Asher, a Republican Party official, in return for a contract with the Commonwealth that would have generated $4 million in profits. The scheme was discovered, the contract was cancelled, and another company performed the work for $1.3 million. *United States* v. *Smith*, 789 F.2d at 198-199.

The indictment and jury instructions on the conspiracy to commit mail fraud count were predicated on the theory that petitioner had conspired to defraud the citizens of Pennsylvania of both intangible and tangible rights. The scheme allegedly defrauded the citizenry of its intangible right to honest and disinterested services by government officials. The government also contended that petitioner had defrauded the people of tangible savings that would have resulted from impartially awarded contracts. At trial,

petitioner did not object to the government's reliance on the intangible rights theory.

Following this Court's decision in *McNally*, which held that the mail fraud statute does not reach schemes to deprive citizens of the intangible right to honest government, and after petitioner had completed serving his sentence, he filed an application for a writ of error coram nobis to vacate his conviction. The district court denied relief. The court concluded, based on the evidence and the jury instructions, that "the jury could not have convicted [petitioner] of conspiracy to commit mail fraud without finding that an object of the scheme to defraud was to deprive the citizens of Pennsylvania of money." Pet. App. 6a.

The court of appeals affirmed. It concluded that "the indictment alleges and the evidence introduced by the government shows that [petitioner] schemed to defraud the Commonwealth of Pennsylvania by securing no-bid FICA recovery contracts through the bribery of public officials and did, in fact, cause a money loss to the Commonwealth through such a scheme." Pet. App. 13a.

ARGUMENT

Petitioner contends (Pet. 5-9) that this Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits concerning whether coram nobis relief is available to vacate mail fraud convictions that were based in part on an intangible rights theory.

In our brief acquiescing in the certiorari petition in *Keane* v. *United States*, No. 88-1178, and in our petition for a writ of certiorari in *United States* v. *Mandel*, No. 88-1759, we urged the Court to resolve

the conflict on this issue. This Court, however, denied certiorari in both cases. *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989); *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989). Nothing has occurred since the Court denied certiorari in those cases that would make review in this case more appropriate. (The court of appeals' decision in this case was cited in the submissions in *Keane*.)

In any event, petitioner is clearly not entitled to coram nobis relief. In *United States* v. *Morgan*, 346 U.S. 502 (1954), this Court stated that not all errors, but only those " 'of the most fundamental character,' " warrant coram nobis relief. *Id.* at 512 (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)). The defect in the jury instructions here did not amount to fundamental error since petitioner's scheme clearly contemplated a loss to Pennsylvania of property within the meaning of *McNally*. The courts below determined that the indictment, the proof, and the jury instructions focused on monetary loss. As noted by the court of appeals: "[T]he loss of money was implicit in the intangible rights scheme. * * * [The court] is unable to hypothesize a set of circumstances under which the jury could have found [petitioner] guilty of depriving the citizens of the Commonwealth of Pennsylvania of their right to honest government (an impermissible intangible right under *McNally*) without also having found that [petitioner] was involved in a scheme the sole purpose of which was to insure that a company known as CTA obtained a no-bid FICA recovery contract at a substantially greater cost to the Commonwealth of Pennsylvania than a contract obtained through tradi-

tional competitive bidding." Pet. App. 8a-9a. Thus, this case is quite unlike *McNally*, where the Court stressed that Kentucky, the alleged victim of the scheme, had lost no money (483 U.S. at 360).[2]

Moreover, this Court recently denied the petitions of co-conspirators Smith and Asher, each of whom raised *McNally* challenges to their convictions. *United States* v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, 109 S. Ct. 836 (1989); *United States* v. *Smith*, 865 F.2d 253 (3d Cir. 1988) (Table), cert. denied, 109 S. Ct. 1936 (1989). Asher, who was tried separately from Smith and petitioner, raised his *McNally* challenge to his conviction on direct appeal. Smith attacked his conviction on *McNally* grounds by a collateral attack on his conviction under 28 U.S.C. 2255. The court of appeals rejected their contentions, holding in each case, as it did in this case, that their scheme contemplated a loss of money by the victims. Because Asher was not entitled to reversal of his conviction on direct appeal and Smith was not entitled to reversal of his conviction under Section 2255, it follows that petitioner is not entitled to coram nobis relief.[3]

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[2] Other courts of appeals have likewise concluded that kickback schemes usually involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987). That question is of no prospective importance, in any event, in light of the amendment of the mail fraud statute to overturn *McNally*. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508; see 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

[3] Contrary to petitioner's contention (Pet. 11-12), the court of appeals correctly examined the record to determine whether petitioner was prejudiced by the inclusion of in-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tangible rights language in the jury instructions. See generally *United States* v. *Hasting*, 461 U.S. 499, 509-512 (1982). Furthermore, the court properly relied on its decision affirming petitioner's conviction on direct appeal (see Pet. App. 14a) in concluding that petitioner's scheme deprived Pennsylvania of money.

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